



**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

---

ROCHESTER POLICE OFFICERS,	:	
	:	
LOCAL 580	:	
	:	
Complainant	:	CASE NO. P-0749:14
	:	
v.	:	DECISION NO. 97-060
	:	
ROCHESTER POLICE COMMISSION	:	
	:	
Respondent	:	

---

APPEARANCES

Representing Rochester Police Officers, International Brotherhood of Police Officers, Local 580:

Peter C. Phillips, Esq.

Representing Rochester Police Commission:

Gary W. Wulf, Labor Relations Consultant

Also appearing:

Daniel Anger, Rochester Police  
David G. Dubois, Rochester Police  
Ann M. Brideau, Rochester Police  
Ray Porelle, I.B.P.O., Local 580  
Donovan E. Funk, II, I.B.P.O., Local 580

BACKGROUND

The International Brotherhood of Police Officers, Local 580, on behalf of Rochester Police Officers (Union) filed unfair labor practice (ULP) charges against the Rochester Police Commission (Commission) on March 19, 1997, alleging violations of RSA 273-A:5 I (a), (c), (d), (e), (g), (h) and (i) resulting from the Commission's refusal to arbitrate a one day disciplinary suspension. The Commission filed its answer on March 31, 1997. This matter was heard by the PELRB on June 3, 1997.

FINDINGS OF FACT

1. The Rochester Police Commission is a "public employer" of police officers and other personnel within the meaning of RSA 273-A:1 X.
2. The International Brotherhood of Police Officers (IBPO), Local 580, by affiliation, is the duly certified bargaining agent for full-time police officers through the rank of sergeant employed by the City of Rochester/Rochester Police Commission.
3. The Commission and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 to June 30, 1996. They are in the process of bargaining for a successor agreement. The former CBA continues under the *status quo* doctrine. Article V of the CBA describes the "Dispute Procedure" and defines a "dispute" as meaning "grievance or disagreements arising out of the application or interpretation of the provisions of the Agreement." The process sets forth a four (4) step procedure: (1) informal discussions with a superior, (2) written submittal to the Chief of Police, (3) written submission to the Police Commission, and (4) final and binding arbitration.

Article VI of the CBA is entitled "Disciplinary Proceedings" and provides:

- A. The procedure for disciplinary action shall include notice, in writing, to the employee with a copy placed in the employee's personnel file while includes a statement of the reason(s) for the discipline.
- B. Employees shall have the opportunity to present written statements as to their position and opinion regarding disciplinary proceedings, which shall become part of the disciplinary file.
- C. In the event of a written reprimand, the personnel record of the employee will be cleared of any written evidence of such discipline after one (1) year from the date of the discipline, provided there be no written reprimands, suspensions, demotions or other disciplinary actions during the one (1) year period. In the event of a suspension or demotion, the

personnel record of the employee will be cleared of any written evidence of such discipline after three (3) years from the date of suspension or demotion, provided there are no written reprimands, suspensions, demotions, or other disciplinary actions during the three (3) year period.

Article VIII is "Commission Rights" and says: The Commission shall retain the sole right and authority to operate and direct the affairs of the Police Department in all its various aspects. Among the rights retained is the Commission's right to determine the Department's mission and set standards and service offered to the public; to direct the working force; to plan, direct, control and determine the operations or services to be conducted in and by the Police Department or by employees of the Department; to assign and transfer employees; to hire, promote, or demote employees and to suspend, discipline or discharge employees for just cause; to relieve employees due to lack of work or for other legitimate reasons; to make and enforce rules and regulation subject to RSA 273-A; and to change methods, equipment or facilities ... (Emphasis added.)

4. By letter dated July 23, 1996, Officer Raymond Porelle received a letter of reprimand, acknowledged by him on August 7, 1996, for failure to obey a lawful order, i.e., a duty assignment on July 11, 1996 to complete a task by noon on that date which he failed to do. The task involved a directive from Captain Donlon to Porelle to complete a written report relating to his clothing allowance and pending purchases by noon. Donlon had not received the report by noon so he sought out Porelle. Porelle said he had not had time to do it. Donlon then waited while Porelle completed the report. Lt. Michael Allen conducted an internal investigation, learned from Porelle that he had not completed the task because he was diverted to something else and forgot it, and sustained Donlon's complaint. The letter of reprimand followed. Union Exhibit No. 1.
5. Porelle appealed the letter of reprimand by

letter of August 14, 1996 (Union Exhibit No. 2) to the Police Commission. The Commission held a public hearing on September 18, 1996 "to determine whether disciplinary action should be taken against Officer Porelle" and thereafter imposed a one (1) day suspension without pay, thus increasing the penalty from the reprimand. Union Exhibit No. 3.

6. Counsel Phillips for the IBPO requested a list of arbitrators by letter of January 31, 1997 followed by an arbitrator appointment request form on February 10, 1997. Union Exhibit Nos. 4 and 5. That list was provided to the parties by letter from the PELRB dated February 20, 1997.
7. On February 4, 1997, Jerome Grossman, Esq., counsel for the Commission/City of Rochester, wrote Phillips, in pertinent part:

Disciplinary matters are not and never have been subject to the dispute procedure provided for in the contract. Disciplinary matters are, as you are well aware, reserved under Article Eight "Commission Rights". The Commission retains the sole right and authority to direct and operate the affairs of the department including matters as defined in said Article Eight.

Under the General Regulations of the Rochester Police Commission, Section 4 outlines the disciplinary procedure. Further, Section 6 provides that if any officer is aggrieved by any order or decision of the Police Commission concerning a disciplinary matter, that officer may appeal said decision to the Superior Court by a petition for certiorari. Any such petition must be presented to the Court within thirty (30) days after the date of decision or order of the Police Commission. The order of the Commission in this case is dated September 20, 1996. Accordingly, any rights of appeal expired on October 20, 1996. (Union Exhibit No. 6)

8. On February 7, 1997, Phillips responded to Grossman, taking issue with his assertions and saying:

I must dispute with you your contention that "disciplinary matters are not and never have been subject to the dispute procedure provided in the contract". As you should be aware,

IBPO Local 580 and the Rochester Police Commission engaged in an arbitration just last fall concerning a disciplinary matter. The arbitrator, who was appointed from a list furnished by the PELRB, considered whether or not the Commission had "just cause" to issue Officer Porelle a letter of reprimand. Indeed, at a hearing before the PELRB, it was agreed that Officer Porelle could appeal the discipline in this manner. At no time did the representative for the Commission, either before the PELRB or the arbitrator, contend that an arbitrator does not have jurisdiction to hear a disciplinary appeal under the contractual dispute procedure. In any event, Article Eight of the parties' contract provides, inter alia, for the Commission's right "to suspend, discipline or discharge employees for just cause..." The Union is not disputing the Commission's right to discipline an officer for just cause. It is, however, disputing whether or not the Commission had just cause in this case. As such, the Union contends that the Commission has violated Article Eight by suspending Officer Porelle for one (1) day without just cause. Accordingly, this matter is clearly arbitrable as a disagreement arising out of the application or the interpretation of the provisions of the parties' Agreement. (Union Exhibit No. 7)

9. On February 27, 1997, Gary Wulf, Labor Relations Consultant for the Commission/City, wrote Phillips about the selection of an arbitrator and acknowledged the Commission's right to raise threshold issues of arbitrability. In Union Exhibit No. 8, Wulf said:

I am responding for the Police Commission to the list of suggested arbitrators for the Raymond Porelle - one (1) day suspension case. I have been advised by Jerry Grossman regarding the threshold issue of arbitrability raised regarding the Commission's powers to discipline department employees. That matter, is obviously, one that may be raised at the arbitration hearing.

I have reviewed the resumes of the suggested arbitrators as provided by the PELRB. I find none of the individuals to be acceptable to the Police Commission. Do you have a list

of acceptable neutrals from which you make your selections? I would be willing to see if there is any mutual recommendation possible. It would be preferable to a PELRB "grab-bag" appointment.

10. On March 10, 1997, Wulf again wrote Phillips, Reversing his position on arbitrability and saying in pertinent part:

The Police Commission will not agree to participate in the arbitration of this disciplinary action. If the grievant was displeased with the decision, on appeal, of the Police Commission, he should have pursued the issued in Superior Court. He did not do so. The matter now is significantly more important than the one day suspension. It is now a question of the powers of an arbitrator to supersede those of the Police Commission. (Union Exhibit No. 9.)

11. Phillips presented evidence that Officers Porelle and Brideau were disciplined for non-compliance with a unilaterally implemented "ordered overtime" policy in 1995 (Union Exhibit No. 10), that the parties then agreed to arbitrate Porelle's letter of reprimand resulting therefrom (Union Exhibit No. 12) and that Wulf had argued that such a matter should be processed under the arbitration language of the contract rather than as a ULP before the PELRB. Specifically, by letter of March 25, 1996 to the PELRB in answer to a ULP filed in Case No. P-0749:8 relative to Porelle's 1995 reprimand, Wulf said:

The Union has not submitted this matter to the PELRB for arbitration as required by the Agreement between the parties. Instead, they have abandoned the grievance procedure and, inappropriately, filed an improper practice charge. This both violates the rules of the PELRB and the collective bargaining agreement.

\* \* \* \* \*

Discipline without just cause, if that is the allegation, properly belonged within the grievance procedure....(Union Exhibit No. 11, pp 2 and 3.)

12. The Rochester Police Commission creates, updates and promulgates "General Regulations," also referred to as "Rules and Regulations." As

adopted on July 2, 1980 and amended February 27, 1988, they addressed appeals by officers who have been aggrieved by any order or decision of the Police Commission, to wit:

Any Police Officer aggrieved by any order or decision of the Police Commission concerning a disciplinary matter may appeal said decision to the Superior Court by a petition for certiorari. Such petition shall be presented to the Court within thirty (30) days after the date of the decision or order of the Police Commission.

This same language appears in the General Regulations as most recently updated on March 6, 1996. (Commission Exhibit No. 2, parts 1 and 2.) There is no evidence that the appeal rights language, quoted above, was the the product of negotiations between the parties when originally implemented in 1980 or as it has, or the Rules and Regulations, generally, have been modified or amended from time to time since then.

#### DECISION AND ORDER

The position taken by the Commission in March of 1995 in Case No. P-0749:8 (Finding No. 11) and again by its representative, Mr. Wulf, on February 27, 1997 (Finding No. 9), is the appropriate one. The Commission's subsequent refusal to arbitrate as articulated on March 19, 1997 (Finding No. 10) is not.

The parties have agreed, through their CBA, on the definition of a grievance, i.e., a disagreement arising out of the application or interpretation of the provisions of their agreement. Finding No. 3. That has occurred. Article VIII speaks to the employer's right to "...suspend, discipline, or discharge employees for just cause." That, too, has occurred, in the form of the one day suspension of Porelle which the Union contends was done without just cause. Thus, the issue is joined. There is an allegation of an inappropriate application of a provision of the contract for which the agreed upon avenue of redress is the grievance procedure, as described in Finding No. 3. Failure to adhere to this contractual provision is a breach of contract and, thus, a ULP.

Mr. Wulf recognized the role of the grievance procedure when he agreed that an earlier reprimand, unquestionably a disciplinary event, should be processed as a grievance and not as a ULP, i.e., "discipline without just cause...properly belongs within the grievance procedure." Finding No. 11. It is inconsistent, illogical and inappropriate for the Commission now to argue, under the terms of the same CBA as applied after July 1, 1995 to the acts complained in Case No. P-0749:8, that this case is not susceptible to arbitration. This is inconsistent both with a reading of the CBA, as discussed above, and

with public policy under RSA 273-A:4 which calls for a workable, and we believe a consistent, grievance procedure. "To allow either party to the CBA to have exclusive and complete control over the interpretation and utilization of the grievance procedure would make it unacceptable and unworkable as contemplated under RSA 273-A:4, thus making it meaningless as a tool for resolution of disputes under the CBA." State Employees Association v. Town of Bedford, Decision No. 96-037 (June 5, 1996). If the parties are desirous of a grievance procedure different from what they now have, the proper way to address that is through the negotiations process.

As we noted in Lincoln-Woodstock Cooperative School District, Decision No. 96-01 (January 16, 1996), the two leading cases on arbitrability are Appeal of Westmoreland School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). In Westmoreland, the New Hampshire Supreme Court (Court), citing to Steelworkers v. Warrior and Gulf Co., 363 U.S. 574 (1960), discussed the "positive assurance" test. "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and 'in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" We conclude that the combination of the negotiated grievance procedure, the definition of what constitutes a grievance and the contractual reference to the right to discipline for "just cause" all create a presumption of arbitrability in this case. We find no "forceful evidence" of a purpose to exclude the subject matter of the just cause grievance from arbitration and, in so finding, have determined that the Commission has not and cannot satisfy the "positive assurance" test of Westmoreland and Nashua.

The Commission's refusal to proceed to arbitration on this grievance is a breach of the parties' CBA and, as such, is a ULP under RSA 273-A:5 I (h). The Commission is directed to CEASE AND DESIST from refusing to process the grievance to arbitration and the parties are directed to proceed with the selection of an arbitrator and to complete the arbitration process forthwith.

So ordered.

Signed this 9th day of July, 1997.

  
 EDWARD J. HASELTINE  
 Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding.  
 Members Seymour Osman and Richard Molan present and voting.